

**United States Department of Labor
Employees' Compensation Appeals Board**

A.C., Appellant

and

**DEPARTMENT OF DEFENSE, DEFENSE
FINANCE & ACCOUNTING SERVICE,
Cleveland, OH, Employer**

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**Docket No. 19-0174
Issued: July 9, 2019**

Appearances:

Lonnie Boylan, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 29, 2018 appellant, through counsel, filed a timely appeal from a June 1, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the June 1, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$30,340.48 for the period October 9, 2012 through October 15, 2016; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments.

FACTUAL HISTORY

OWCP accepted that on August 16, 2010 appellant, then a 65-year-old financial systems specialist, sustained injuries to her knees, shoulders, and left wrist when she tripped and fell while in the performance of duty. She stopped work on August 26, 2010 and returned to full-time light-duty work on September 20, 2010. OWCP accepted appellant's claim for bilateral knee contusion, bilateral knee and leg sprain, and lumbosacral sprain. It subsequently expanded acceptance of the claim to include aggravation of bilateral knee arthritis, bilateral partial rotator cuff tears, right shoulder rotator cuff tear, bilateral carpal tunnel syndrome and lesion of the ulnar nerves, left wrist sprain, left tenosynovitis, bilateral shoulder sprain, neck sprain, and cervical radiculopathy.

On April 7, 2011 appellant became eligible to receive full retirement benefits from the Social Security Administration (SSA).

On October 9, 2012 appellant underwent OWCP-authorized left total knee replacement surgery. She stopped work and received wage-loss compensation for total disability on the supplemental rolls beginning October 9, 2012. On May 13, 2013 appellant returned to work part time for three days a week and received wage-loss compensation for partial disability. She stopped work again on February 24, 2014 and received wage-loss compensation for total disability. OWCP placed appellant on the periodic rolls, effective June 1, 2014.

A notification of personnel action (Form SF-50) dated April 30, 2016, indicated that appellant voluntarily retired from the employing establishment, effective that date. The form also indicated that she was covered under the Federal Insurance Contributions Act (FICA) retirement plan and partial Civil Service Retirement System (CSRS) retirement plan, with a March 8, 1991 service computation. It listed appellant's retirement plan as Code C, applicable to those under the CSRS offset retirement plan.

In a form dated October 19, 2016, the SSA advised OWCP that appellant had concurrently received FECA benefits and retirement benefits through the Federal Employees Retirement System (FERS) beginning April 2011. It provided the amount that she had received in retirement benefits, including the amount earned through FERS and the hypothetical amount that she would have received without FERS for April and December 2011, December 2012, December 2013, December 2014, and December 2015.

OWCP completed a FERS offset calculation form on October 28, 2016. It determined the 28-day FERS offset amount for the days in each period, which it added to find a total overpayment of \$47,526.35.

OWCP, in a November 1, 2016 letter, adjusted appellant's compensation to offset the portion of her SSA retirement benefits attributable to her federal service. It informed her that she would receive net compensation of \$3,479.70 every 28 days.

On November 10, 2016 OWCP issued a preliminary determination that appellant had received an overpayment of compensation in the amount of \$47,526.35 because she had received FECA wage-loss compensation benefits concurrently with SSA retirement benefits for the period April 1, 2011 through October 15, 2016. It provided an overpayment calculation and found that she was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) and provided her with her appeal rights. It afforded her 30 days to respond.

On December 1, 2016 appellant requested a prerecoupment hearing before an OWCP hearing representative and waiver of the recovery of the overpayment.

A prerecoupment hearing was held on June 19, 2017. Appellant testified that she was not under the FERS retirement system, but was a CSRS employee. She also asserted that she was not receiving benefits during the entire period for which the overpayment had been calculated. Appellant explained that for the period April 2011 to November 15, 2016, she returned to work at various points in time and was not totally disabled.

In a letter dated July 13, 2017, the employing establishment provided comments on the hearing transcript. It also provided several notification of personnel action forms (SF-50) dated May 11, 2008 to April 30, 2016. The forms indicated that appellant's retirement plan was FICA and partial CSRS with a March 8, 1991 service computation.

By decision dated September 5, 2017, an OWCP hearing representative vacated the November 10, 2016 preliminary overpayment determination. She affirmed the fact of overpayment, but remanded the case for OWCP to properly calculate the amount of the overpayment.⁴

OWCP completed a FERS offset calculation form on September 28, 2017. It determined the 28-day FERS offset amount for the days in each of the following time periods: October 9 to November 30, 2012; December 1, 2012 to May 31, 2013; February 24 to November 30, 2014; December 1, 2014 to November 30, 2015; and December 1, 2015 to October 15, 2016, which it added together to find a total overpayment of \$30,340.48.

In a preliminary determination dated September 28, 2017, OWCP notified appellant that she had received an overpayment of compensation in the amount of \$30,340.48 because it had failed to reduce her partial wage-loss compensation benefits for the periods October 9, 2012 through May 12, 2013 and February 24, 2014 through October 15, 2016 by the portion of her SSA benefits that were attributable to her federal service. It calculated the overpayment amount by determining the difference between her SSA benefit with and without FERS for each period and adding these amounts to find a total overpayment of \$30,340.48. OWCP further advised appellant

⁴ The hearing representative noted that OWCP had incorrectly calculated overpayment based on total rather than intermittent compensation from April 2011 through September 2012 and from May 2013 until February 2014. She noted that appellant only received intermittent compensation of \$2,543.52 from April 2011 through September 2012, then began receiving total disability from October 6, 2012 through May 12, 2013, and then partial compensation until appellant stopped work again in February 2014.

of its preliminary determination that she was at fault in the creation of the overpayment because she failed to provide information on her EN1032 forms which she knew or should have reasonably known to be material. It requested that, within 30 days of the date of the letter, she submit a completed overpayment recovery questionnaire (Form OWCP-20) with supporting financial documentation, and exercise her appeal rights.

On October 5, 2017 OWCP reissued the September 28, 2017 preliminary determination.

On October 19, 2017 appellant requested a prerecoupment hearing on the issues of fault and possible waiver of the overpayment before an OWCP hearing representative. She submitted a partially completed Form OWCP-20 and financial documents. Appellant asserted that she was not at fault in the creation of the overpayment because SSA, OWCP, or OPM advised her that she was required to report social security payments. A hearing was held on April 6, 2018.

In a memorandum dated April 27, 2018, a workers' compensation specialist for the employing establishment responded to the hearing transcript. She alleged that when appellant returned to her job in 2005, appellant was counseled by Human Resources professionals as to the implications of selecting the CSRS offset requirement upon her retirement. The workers' compensation specialist noted that appellant elected to receive CSRS retirement.

By decision dated June 1, 2018, an OWCP hearing representative determined that appellant received an overpayment of compensation in the amount of \$30,340.48 for the period October 9, 2012 through October 15, 2016 because she received SSA benefits in addition to her wage-loss compensation benefits under FECA without proper offset.⁵ She also found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. The hearing representative required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing wage-loss compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA⁶ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁷

Section 8116 of FECA and section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-based benefits that are attributable to federal service of the employee.⁸ However, an offset is not required where the

⁵ The hearing representative noted that OWCP properly recalculated the amount of the overpayment in accordance with the September 5, 2017 OWCP decision as the recalculation accounted for the periods during which appellant received only intermittent wage-loss compensation.

⁶ *Supra* note 2.

⁷ 5 U.S.C. § 8102(a).

⁸ 20 C.F.R. § 10.421(d); *see L.J.*, 59 ECAB 264 (2007).

employee beneficiary is covered under the CSRS and/or her SSA age-related benefits attributable to private sector employment.⁹

ANALYSIS -- ISSUE 1

The Board finds that the case is not in posture for decision.

OWCP determined that appellant had received an overpayment of compensation in the amount of \$30,340.48 for the period October 9, 2012 through October 15, 2016 because she received SSA benefits in addition to her wage-loss compensation benefits under FECA without proper offset. The offset provision of section 8116(d)(2) applies to SSA benefits that are attributable to federal service.¹⁰ An offset is not required, however, where the employee beneficiary is covered under the CSRS and/or her SSA age-related benefits attributable to private sector employment.¹¹

The Board finds that the evidence of record has established that appellant paid FICA taxes as a federal civilian employee under the CSRS Interim/Offset system, a precursor to FERS, which required contributions to both CSRS and social security. It generally applied to certain new hires or former CSRS-covered employees who had been separated from service for at least one year and rehired after December 31, 1983.¹² The evidence of record has demonstrated that appellant received age-based SSA benefits after retirement as a result of her contributions to SSA under the CSRS interim system. Several SF-50 forms in the record establish that appellant's retirement plan was designated as Code C, applicable to those under the CSRS offset retirement plan.¹³ The Board finds, therefore, that the evidence of record is unclear with regard to what obligations appellant had to contribute to the CSRS and SSA systems and whether an offset was required. As OWCP has not established that appellant received SSA benefits based in part on her federal service concurrently with disability compensation from OWCP without a proper offset, it has not established that she received an overpayment of compensation from October 9, 2012 through May 12, 2013 and from February 14, 2014 through October 15, 2016.

The Board further finds that the evidence of record is unclear as to whether the rates under the CSRS-offset plan are the same as the rates in the FERS plan. SSA provided OWCP with information regarding appellant's rate of SSA benefits beginning October 9, 2012 both with and without FERS. As explained above, appellant, however, had elected to receive CSRS retirement, not FERS retirement. Accordingly, the case will be remanded to OWCP to obtain additional information from SSA and the Office of Personnel Management regarding appellant's retirement system and her SSA rate with and without any offset required based on her federal civilian service.¹⁴ It will then determine whether appellant received an overpayment of compensation and

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Claims*, Chapter 2.812.9(c) (May 2012); see also *id.* at Chapter 2.1000.4e(2) (January 1997).

¹⁰ *Supra* note 8.

¹¹ *Supra* note 9.

¹² See *J.M.*, Docket No. 12-0954 (issued November 26, 2012).

¹³ See *J.S.*, Docket No. 17-0965 (issued August 16, 2017).

¹⁴ See *B.O.*, Docket No. 17-0510 (issued November 3, 2017); *D.B.*, Docket No. 16-1224 (issued June 23, 2017).

also recalculate the period and amount of the overpayment. Following this and any other development deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the June 1, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further proceedings consistent with this decision.

Issued: July 9, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ In light of the Board's determination regarding the fact and amount of the overpayment, it is premature to address the issues of fault and recovery of the overpayment.